



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: South Atlantic Dredging Company, Inc.

File: B-239834

Date: September 20, 1990

Joseph A. Hackenbracht, Jr., Esq., Starfield & Payne, for the protester.
Vasio Gianulias, Esq., Department of the Navy, for the agency.
Stephen Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly withdrew a small business set-aside on the ground that low bid exceeded the fair market price, because agency's fair market price determination allegedly was based on unrealistically low government estimate of the cost of the work, is denied; the record shows that the government estimate had a rational basis, and that the protester's bid was substantially higher than a subsequently submitted large business bid, the government estimate, and the level of available funds for the work.

DECISION

South Atlantic Dredging Company, Inc. (SAD) protests the rejection of its bid and the withdrawal of the total small business set-aside under invitation for bids (IFB) No. N62470-90-B-0041, issued by the Department of the Navy for dredging work at the Naval Station in Norfolk, Virginia. SAD asserts that the Navy improperly determined that the bids submitted under the set-aside exceeded the fair market price, based in part on a government estimate of the cost of the work that SAD asserts was unrealistically low.

We deny the protest.

The IFB originally was synopsized in the Commerce Business Daily (CBD) as an unrestricted procurement. On the recommendation of the Small Business Administration, however, the Navy modified the IFB and resynopsized the procurement as a total small business set-aside. As a result of the two CBD notices, the agency received requests

049530/ 142279

for the solicitation from both large and small businesses. The Navy ultimately received two small business bids, one for \$3,071,970 from SAD, and one for \$5,214,200 from Atkinson Dredging Company. After the bids and the government estimate were made public, SAD objected to the Navy that the government estimate for the work, \$1,940,775, was too low.^{1/} In response to SAD's complaint, the Navy reevaluated its estimate and notified SAD that it agreed in part with SAD's objections to the original estimate. Specifically, the Navy stated that its original estimate, which was based on dredging contracts in the 2 preceding fiscal years, had not provided for an additional 8,000 feet of pipeline that was required by a change in the location of the dumping site from the one used in the prior contracts; had not included the new wage scale that was issued by the Department of Labor on April 11; and had not included the cost of mobilization and demobilization. In view of these omissions, the Navy advised SAD that it was revising the estimate upward to \$2,399,925, only slightly below the \$2,400,000 that the Navy had available to fund the dredging work.

Because of the remaining wide disparity (28 percent) between SAD's low bid and both the available funds and the government estimate, the Navy made a determination to withdraw the set-aside and open the procurement to large business bidders. Accordingly, the Navy issued an amendment to the IFB which withdrew the small business set-aside, transferred a portion of the dredging work from the base to the additive bid schedule of the solicitation, and set a date for the submission of new bids under the revised, unrestricted IFB. The Navy sent copies of the amendment to all businesses, both large and small, that had requested the IFB originally in response to the two CBD synopses, including SAD. In the unrestricted competition, Norfolk Dredging Company, Inc., a large business, submitted the low bid, \$1,996,015; SAD did not submit a bid.^{2/}

^{1/} Although the agency had not yet made a decision concerning withdrawal of the small business set-aside, SAD apparently anticipated that the set-aside would be withdrawn in light of the wide discrepancy between the government estimate and the low bid.

^{2/} The Navy subsequently made a formal determination to proceed with the award, notwithstanding the protest to our Office, on grounds of compelling urgency.

SAD asserts that the government estimate, even as revised, is unjustifiably low, and thus is not an adequate basis for determining that its low bid under the small business set-aside was not a fair market price. The protester argues that, while the estimate was predicated on the use of one large dredge, small businesses would not be able to afford such equipment and would have to use two smaller dredges, at greater cost. Thus, according to SAD, since the estimate that the agency used in concluding that available small business prices were too high was based on the use of equipment that only large businesses would have available, the estimate did not provide a fair benchmark of what constituted a fair market price. We disagree.

Generally, an agency may withdraw a small business set-aside on the basis that award to a small business would be detrimental to the public interest, for example, by payment of more than a fair market price. See Federal Acquisition Regulation (FAR) § 19.506(a) (FAC 84-48). In determining the fair market price of small business set-asides, the FAR provides that the agency shall apply the reasonable price guidelines of FAR § 15.805-2. See FAR § 19.202-6 (FAC 84-56). Under those guidelines, the contracting officer may use one or more of several listed methods to determine a fair and reasonable price, including a comparison of proposed prices received in response to the solicitation, a comparison of prior proposed prices and contract prices with the current proposed prices, and a comparison of proposed prices with independent government cost estimates. FAR § 15.805-2. We will not question a government estimate where the contracting agency has submitted supporting evidence which provides a reasonable basis for the estimate, IFR, Inc., B-209929, May 17, 1983, 83-1 CPD ¶ 524; similarly, we will not disturb an agency's determination of fair market price unless it lacks a rational basis or there is a showing of fraud or bad faith on the part of the contracting officer. See American Imaging Servs., B-238969, B-238971, 69 Comp. Gen. ___, July 19, 1990, 90-2 CPD ¶ 51. Here, we conclude that the agency's determination was reasonably based and should not be disturbed.

The record indicates that, when SAD initially complained to the Navy that the first government estimate was too low, the firm stated that two dredges would be required due to the magnitude of the work and the short time that the IFB allowed for its completion. The Navy, on the other hand, referred to the IFB specification that "the contractor will be permitted to work on only one side of one pier at a time." In light of that requirement, the Navy stated that it would be difficult to utilize two dredges. For that

reason, and because of the Navy's belief that a larger dredge could perform required work north of pier 12 more efficiently than two smaller dredges, the Navy based its initial and revised estimates on the use of one large dredge.

This approach to estimating dredging equipment costs was reasonable. SAD does not allege, and there is nothing in the record to suggest, that the Navy structured its estimate on the basis of a single dredge specifically to place the fair market price beyond the range of small business bidders; rather, the agency's approach seems to have been based entirely on specifications in the IFB (which SAD did not protest), and on a desire for efficient performance. (In its protest to our Office, SAD itself concedes that using one large dredge is more efficient and less expensive than using two smaller ones.) Consequently, we find no basis for questioning the government estimate that the Navy used in determining fair market prices.

Where, as here, a determination of excessive price is based primarily on a comparison of the bid price with the government estimate, we have found cancellation to be justified where the low bid exceeded the government estimate by as little as 7.2 percent. Nationwide Roofing & Sheet Metal Co., Inc., B-231895.2, Oct. 28, 1988, 88-2 CPD ¶ 404. Here, as noted above, the discrepancy was almost 4 times as great, or 28 percent. Since the record shows that the Navy had a rational basis for determining the fair market price, and there is no allegation or evidence of bad faith or fraud, we conclude that the agency's determination with regard to fair market price should not be disturbed, and that the Navy therefore had a proper basis for withdrawing the small business set-aside.

SAD also suggests that the reasonableness of its bid should be determined ultimately by reference to large business bids submitted at the second bid opening. Specifically, SAD argues that bids of \$2,897,230 and \$2,989,000 that were submitted by two large businesses were so close to its own bid of \$3,071,970 that the price premium involved would have been within the acceptable range for policies aimed at promoting small business. SAD's argument ignores the fact, that these two bids were not in line for award. Norfolk's low bid was approximately one-third lower than these bids, and well below the revised estimate.

We note, furthermore, that award to SAD was not feasible due to the amount of funds available; SAD's low bid exceeded the available funds (\$2,400,000) by \$671,970. A contracting agency properly may cancel a solicitation when sufficient

funds are not available, irrespective of disputes concerning the validity of the government estimate or the reasonableness of the low bid price. See Ignacio Sanchez Constr., B-238492, May 11, 1990, 90-1 CPD ¶ 467. Withdrawing the small business set-aside thus also appears to have been warranted on this basis.

SAD asserts that the agency improperly withdrew the set-aside by amending the IFB, rather than canceling the solicitation and issuing a new one. We fail to see how SAD was prejudiced by the manner in which the Navy proceeded in withdrawing the set-aside and opening the competition to large businesses; SAD could have submitted a new bid under the amended IFB, but opted not to do so. In any case, there was nothing objectionable in the Navy's approach. Although the Navy did not resynopsise the IFB, it made a formal determination and finding that synopsis of the amended IFB should be waived due to the compelling urgency of its need for completion of the dredging work. See FAR § 5.202(a)(2) (FAC 84-52). Moreover, as noted above, the IFB already had been synopsized twice in the CBD, once as an unrestricted procurement and once as a small business set-aside, and the Navy sent copies of the amended IFB to all firms that had expressed interest in response to the two prior CBD notices, including all known firms capable of performing the dredging work.

SAD finally objects that accepting a second round of bids under the amended IFB resulted in an improper auction. This argument is without merit. There is nothing objectionable in an agency's recompeting a requirement after properly canceling a solicitation or withdrawing a small business set-aside. There is no indication that the contracting officer here withdrew the set-aside for the purpose of conducting an auction and, although the opportunity to submit bids after rejection of the publicly exposed, excessively priced bids allowed firms to formulate their bids with knowledge of the prior bid prices, the second competition also gave bidders who submitted excessive prices, such as SAD, another opportunity to bid at a lower price. See generally Groathouse Constr., B-235236, B-235250, July 13, 1989, 89-2 CPD ¶ 44.

The protest is denied.


James F. Hinchman
General Counsel